U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 505
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

Mailed 11/08/00

IN THE MATTER OF:	*	
Duvila Dormeus Claimant	*	
v.	*	Case No.: 1999-LHC-1639
East River Terminals, Inc. a/k/a Sealink Caribe and a/k/a Sea Terminal North River, Inc. Employer	*	OWCP No.: 6-172807

APPEARANCES:

David C. Barnett, Esq.
For the Claimant

Samir Mourea
For the Employer

BEFORE: **DAVID W. DI NARDI**
Administrative Law Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on October 8, 1999 in Fort Lauderdale, Florida, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit and EX for an exhibit offered by the Employer. This decision is being rendered after having given full consideration to the entire record.

Post-hearing evidence has been admitted as[1]:

Exhibit No.	Item	Filing Date
CX 9	Attorney Barnett's letter filing Claimant's Motion	10/12/99
ALJ EX 8	This Court's **ORDER ON ORE TENUS MOTION TO COMPEL ATTENDANCE AT DEPOSITION** of a representative of Sealink Caribe and East River Terminals, Inc.	10/13/99
CX 10	Attorney Barnett's letter filing an enlarged copy of CX 5, an exhibit offered into evidence at the hearing	10/15/99
CX 11	Attorney Barnett's letter (1) providing corporate information about the three respondents joined herein, and (2) requesting the issuance of six (6) subpoenas for those named individuals.	10/18/99
ALJ EX 11	This Court's letter sending the subpoenas to Claimant	10/19/99
CX 12	Attorney Barnett's letter advising that the depositions had been scheduled for January 3, 2000	11/29/99
CX 13	Attorney Barnett's letter (1) advising that Sea Link Caribe is now owned by Mr. Tony Manigat, and (2) requesting a subpoena for the deposition of Mr. Manigat	01/07/00
ALJ EX 12	This Court's letter sending same	01/07/00

[1] Claimant offered into evidence at the hearing CX 1- CX 8 and those exhibits are now admitted into evidence due to the Employer's failure to participate herein.

to counsel

Deposition Notices Relating to These Individuals

CX 14	Duvila Dormeus (3/1/00)	02/16/00
CX 15	Tom Smith, Owner of Sea Terminal North River, Inc. (3/1/00)	02/16/00
CX 16	Duvila Dormeus (rescheduled to 3/16/00)	03/06/00
CX 17	Duvila Dormeus (3/16/00)	03/20/00
CX 18	Attorney Barnett's letter (1) filing a status report and (2) advising that employer representatives from East River Terminals and Sea Link Caribe failed to show up twice for their scheduled depositions.	03/29/00
CX 19	Claimant's deposition testimony	03/29/00
CX 20	Attorney Barnett's letter advising that Thomas Smith had failed to appear for his scheduled deposition "on two separate occasions."	04/03/00
CX 21	January 20, 2000 Certificate of Service on Mr. Smith by Javier Sandin	04/03/00
ALJ EX 13	This Court's **ORDER TO SHOW CAUSE** sent to the named individuals identified by Attorney Barnett in CX 11	05/08/00
EX 1	Attorney Patran’s letter Identifying her as agent for East River Terminals, Inc.	05/18/00
ALJ EX 14	This Court’s letter notifying the parties as to Attorney Patran’s Correspondence and allowing	05/30/00

	Employer seven (7) days to file a substantive response to this Court's **ORDER TO SHOW CAUSE**.	
CX 22	Attorney Barnett's letter Suggesting that the record be closed.	09/25/00

The record was closed on September 25, 2000 as counsel for Claimant informed the Court that post-hearing discovery had been completed.

PROCEDURAL HISTORY

The above-captioned matter was called for a hearing on October 8, 1999 in Ft. Lauderdale, Florida, by a **Notice of Hearing and Prehearing Order** issued on June 7, 1999. (ALJ EX 1) However, neither the Employer nor any representative appeared on behalf of the Employer. The hearing was convened to document the Claimant's appearance by counsel and the non-appearance of the Employer. Claimant offered eight (8) exhibits in support of his claim.

Claimant has twice scheduled the deposition of the Employer's representative and twice the representative has failed to appear. (CX 21, CX 22)

Accordingly, as the Employer has consistently failed to participate in the proceeding before the Office of the Administrative Law Judges and as the Employer has failed to obey the lawful directives of this Court, and as the Employer has failed to file s response to the **ORDER TO SHOW CAUSE** to explain its non-actions herein and as the Employer has failed to show good cause why a default decision should not be entered herein, pursuant to 29 C.F.R. §39.16, this Court has no recourse but to enter a **DEFAULT DECISION** against the Employer.

Stipulations and Issues

Claimant's Request for Admissions (ALJ EX 6) is hereby adopted as Employer has failed to participate herein.

1. The Act applies to this proceeding.

2. That Duvila Dormeus ("Claimant" herein) was employed by Sea Link Caribe on or about December 3, 1996.

3. That Sea Link Caribe is located at 2974 Northwest North River Drive, Miami, Florida 33142.

4. That Sea Link Caribe is a wholly-owned subsidiary of Sea Terminal, North River, Inc.

5. That Claimant worked as a Longshoreman for Sea Link Caribe on or about December 3, 1996.

6. That at the time of his accident, Claimant was earning $6.00 an hour.

7. That his average weekly wage is $325.00 per week.

8. That his job description was to load cargo onto vessels at the Sea Link Caribe port location.

9. That on December 3, 1996, Claimant fell from the top of containers which were being loaded onto a vessel.

10. That he sustained injuries to his neck, back and left arm.

11. That he was sent to Jackson Memorial Hospital for immediate medical attention for injuries sustained in the accident of December 3, 1996.

12. That Sea Link Caribe and/or its affiliated corporations have failed to pay Claimant any indemnity benefits.

13. That Sea Link Caribe and/or its affiliated companies have failed to pay Jackson Memorial Hospital for medical care provided to Claimant.

14. That Sea Link Caribe is a cargo shipping business shipping product between Miami and Haiti.

The unresolved issues in this proceeding are:

1. The nature and extent of Claimant's disability.

2. The date of his maximum medical improvement.

3. Entitlement to interest and penalties on any unpaid compensation.

4. Entitlement to future medical care and treatment, as well as payment of certain unpaid medical expenses relating to Claimant's December 3, 1996 injury.

5. Attorney's fee and litigation expenses.

SUMMARY OF THE EVIDENCE

Duvila Dormeus("Claimant" herein), fifty (50) years of age, and who has an employment history of manual labor, has worked as a traditional longshoreman or stevedore at various ports in South Florida and on Wednesday, December 3, 1996, Claimant was working for Sealink Caribe (CX 4), a firm specializing in transporting cargo from Miami to Haiti. Claimant who had been working for the Employer for about 3 ½ months fell about twelve (12) feet onto the deck of the vessel, sustaining an injury to his left hand, neck and back. He was taken by ambulance to Jackson Memorial Hospital in Miami where he was examined in the Emergency Room.

He was immediately admitted once x-rays revealed the severity of the injury. The admitting diagnosis was a radius fracture and he underwent an "open reduction of fracture of radius and ulna with internal fixation" of the left upper extremity. (CX 3, CX 19 at 3-6)

Claimant was treated by Dr. Elizabeth A. Ouellette, an orthopedic surgeon, and he underwent the surgery on December 24, 1996. The post-operative diagnosis was a "comminuted intra-articular left distal radial fracture with volar displacement" and he was discharged the following day in improved condition and to be followed as an outpatient. Claimant's medical records reflect that his left hand was placed in a plaster cast on December 3, 1996 and he was sent home to await further developments. The doctor continued to see Claimant as needed and he was sent to occupational therapy at the hand clinic of the hospital. That therapy continued as needed until May 17, 1997 (or May 1, 1997) and those records do not reflect any subsequent visits at the hand clinic. (CX 3)

Claimant testified about his physically-demanding duties while working for Sea Link Caribe, a stevedoring firm, located on the Miami River, operating out of the Port of Miami and whose cargo was loaded for shipment on ocean-going vessels to Haiti. He worked at least eight (8) hours each day, sometimes working twelve (12) hours to meet a vessel's deadline, Claimant remarking that he worked at least forty (40) hours each week and often worked more than fifty (50) hours each week. His average pay per week was $325.00. He was paid cash and no taxes were deducted. Claimant was hired by a man he identified as "Tony" and who "was the owner of the ship." According to Claimant, East River Terminals was also located at that address on North River Drive (CX 5) but he did not work for them as he worked only for Sea Link Caribe, and that was also the name of the vessel on which he loaded cargo. (CX 19 at 6-11)

According to Claimant, Jean Marshal was a witness to his December 3, 1996 injury and while Claimant "keep(s) in touch with him" and "see(s) him but he doesn't want to come to say

that he is my witness." "Tony" was also there at the time of the accident and there were also other witnesses there at that time. Claimant reported his injury to "Tony" and "Tony" asked his friend to take Claimant to the hospital. Claimant testified that the cast remained on his left hand "for about three months," Claimant remarking that it took him "about one year" to recover from his December 24, 1996 surgery. Neither the Employer nor any insurance carrier has paid any of the hospital or doctors' bills relating to his industrial accident and Claimant pays them $10.00 every time he goes to see the doctor. "Tony" never came to visit Claimant in the hospital and no one from East River Terminals or Sea Link Caribe has ever contacted him after his accident. Claimant did not return to either of those companies, nor did he go down there to talk to "Tony." Claimant has not been advised by either of those companies as to his rights or entitlement to compensation or medical benefits. (CX 19 at 11-15)

Claimant testified that his left hand was still bothering him as of the time of his March 16, 2000 deposition, that that pain travels right up to his left shoulder, that he was unable to find work until November 1, 1999 at which time he began working part-time at Aljoma Lumber, Inc., a firm which makes and sells lumber. He works about thirty-five (35) hours each week and is paid $5.50 per hour. He has also lost strength in his left hand, is unable to move his wrist forward and backward, is unable to squeeze the fingers in his left hand, cannot move his left wrist from side to side and he experiences constant pain. Claimant's current work aggravates his left hand and left shoulder and back problems but he has to work to pay his bills so that he can support his wife and child, and other family members with whom he lives. He also experiences daily neck pain as a result of the December 3, 1996 accident. (CX 19 at 15-20, 23)

Claimant does not know "Tony's" surname and he identified the photographs (CX 5) as the location where he worked for Sea Link Caribe. He obtained that job through a friend who no longer works for that company. (CX 19 at 20-24)

On the basis of the totality of this record[2], I make the following:

Findings of Fact and Conclusions of Law

[2] In view of the procedural posture of this case, Claimant was excused from attending the hearing and his deposition is in evidence as CX 19.

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989);

Brown v. Pacific Dry Dock Industries, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue, resolving all doubts in claimant's favor. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which completely **rules out the** connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not completely rule out the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21

BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied,** 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As Claimant has invoked the Section 20(a) presumption, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to Employer to rebut the presumption with substantial evidence which establishes that Claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son**

of Maryland, 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his comminuted left distal radial fracture with volar displacement, as well as his cervical and lumbar problems, resulted from his December 3, 1996 accident at the Employer's maritime facility. The Employer has introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Janusziewicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the

combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes, and I so find and conclude, that Claimant was performing his usual maritime duties as a traditional longshore worker for about four months for Sea Link Caribe ("Employer"), that on December 3, 1996 Claimant fractured his left hand in a very serious accident, that he also injured his neck and back in that accident, that the Employer had timely notice of the injury, made arrangements for Claimant to be transported to the hospital but thereafter paid neither compensation nor medical benefits to the Claimant and that Claimant timely filed for benefits once a dispute arose between the parties. In fact, the principal issue is the nature and extent of Claimant's disability, an issue I shall now resolve.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984).

While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that he is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "**Pepco**"). **Pepco**, 449 U.S. at 277, n.17; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984). However, **Pepco,** does not apply herein as Claimant also injured his cervical and lumbar areas on December 3, 1996.

On the basis of the totality of this closed record, I find and conclude that Claimant has established that he cannot return to work as a stevedore. The burden thus rests upon the Employer to demonstrate the existence of suitable alternate employment in the area. If the Employer does not carry this burden, Claimant is entitled to a finding of total disability. **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Southern v. Farmers Export Company**, 17 BRBS 64 (1985). In the case at bar, the Employer did not submit any evidence as to the availability of suitable alternate employment. **See Pilkington v. Sun Shipbuilding and Dry Dock Company**, 9 BRBS 473 (1978), **aff'd on reconsideration after remand**, 14 BRBS 119 (1981). **See also Bumble Bee Seafoods v. Director, OWCP**, 629 F.2d 1327 (9th Cir. 1980). I therefore find Claimant has a total disability and that such disability continued until November of 1999, at which time he found work through his own efforts at a lumber store. (CX 19 at 16-17, 23)

Claimant's injury has become permanent. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v.**

Lockheed Shipbuilding and Construction Company, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to

a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

On the basis of the totality of the record, and in the absence of any medical opinion evidence specifically on this issue, I find and conclude, based upon Claimant's testimony, that Claimant reached maximum medical improvement on December 3, 1997 and that he was temporarily and totally disabled from December 3, 1996, when he was forced to discontinue working as a result of his work-related injury, until December 2, 1997. (CX 19 at 13-15) I further find and conclude that from December 3, 997 through October 31, 1999 Claimant was permanently and totally disabled and from November 1, 1999, Claimant has been permanently and partially disabled, and such disability shall continue until further ORDER of this Court.

With reference to Claimant's residual wage-earning capacity, Claimant found work through his own efforts on November 1, 1999. He works thirty-five (35) hours per week and earns $5.50 per hour. As Sections 8(c)(21) and 8(h) require that that hourly rate be adjusted for post-injury inflation and as I find and conclude that Claimant's post-injury wages are representative of his wage-earning capacity, I further find and conclude that his current hourly rate, after such adjustment, may reasonably be set at $4.75, thereby producing a wage-earning capacity of $166.25 (i.e., $4.75 x 35 =).

Accordingly, Claimant's benefits for his permanent partial disability on and after November 1, 1999 shall be based upon such post-injury wage-earning capacity, pursuant to Sections 8(c)(21) and 8(h).

Average Weekly Wage

For the purposes of Section 10 and the determination of the employee's average weekly wage with respect to a claim for compensation for death or disability due to an occupational

disability, the time of injury is the date on which the employee or claimant becomes aware, or on the exercise of reasonable diligence or by reason of medical advice should have been aware, of the relationship between the employment, the disease, and the death or disability. **Todd Shipyards Corp. v. Black**, 717 F.2d 1280 (9th Cir. 1983); **Hoey v. General Dynamics Corporation**, 17 BRBS 229 (1985); **Pitts v. Bethlehem Steel Corp.**, 17 BRBS 17 (1985); **Yalowchuck v. General Dynamics Corp.**, 17 BRBS 13 (1985).

The Act provides three methods for computing claimant's average weekly wage. The first method, found in Section 10(a) of the Act, applies to an employee who shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during **substantially** the whole of the year immediately preceding his injury. **Mulcare v. E.C. Ernst, Inc.**, 18 BRBS 158 (1987). "Substantially the whole of the year" refers to the nature of Claimant's employment, **i.e.**, whether it is intermittent or permanent, **Eleazar v. General Dynamics Corporation**, 7 BRBS 75 (1977), and presupposes that he could have actually earned wages during all 260 days of that year, **O'Connor v. Jeffboat, Inc.**, 8 BRBS 290, 292 (1978), and that he was not prevented from so working by weather conditions or by the employer's varying daily needs. **Lozupone v. Stephano Lozupone and Sons**, 12 BRBS 148, 156 and 157 (1979). A substantial part of the year may be composed of work for two different employers where the skills used in the two jobs are highly comparable. **Hole v. Miami Shipyards Corp.**, 12 BRBS 38 (1980), **rev'd and remanded on other grounds**, 640 F.2d 769 (5th Cir. 1981). The Board has held that since Section 10(a) aims at a theoretical approximation of what a claimant could ideally have been expected to earn, time lost due to strikes, personal business, illness or other reasons is not deducted from the computation. **See O'Connor v. Jeffboat, Inc.**, 8 BRBS 290 (1978). **See also Brien v. Precision Valve/Bayley Marine**, 23 BRBS 207 (1990); **Klubnikin v. Crescent Wharf & Warehouse Co.**, 16 BRBS 183 (1984). Moreover, since average weekly wage includes vacation pay in lieu of vacation, it is apparent that time taken for vacation is considered as part of an employee's time of employment. **See Waters v. Farmer's Export Co.**, 14 BRBS 102 (1981), **aff'd per curiam**, 710 F.2d 836 (5th Cir. 1983); **Duncan v. Washington Metropolitan Area Transit Authority**, 24 BRBS 133, 136 (1990); **Gilliam v. Addison Crane Co.**, 21 BRBS 91 (1987). The Board has held that 34.4 weeks' wages do constitute "substantially the whole of the year," **Duncan**, **supra**, but 33 weeks is not a substantial part of the previous year. **Lozupone**, **supra**. Claimant worked for the Employer for four (4) months prior to his injury. (CX 19 at 6) Therefore Section 10(a) is inapplicable.

The second method for computing average weekly wage, found in Section 10(b), cannot be applied because of the paucity of evidence as to the wages earned by a comparable employee. **Cf. Newpark Shipbuilding & Repair, Inc. v. Roundtree**, 698 F.2d 743 (5th Cir. 1983), **rev'g on other grounds** 13 BRBS 862 (1981), **rehearing granted en banc**, 706 F.2d 502 (5th Cir. 1983), **petition for review dismissed**, 723 F.2d 399 (5th Cir. 1984), **cert. denied**, 469 U.S. 818, 105 S.Ct. 88 (1984).

Whenever Sections 10(a) and (b) cannot "reasonably and fairly be applied," Section 10(c) is applied. **See National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1979); **Gilliam v. Addison Crane Company**, 22 BRBS 91, 93 (19987). The use of Section 10(c) is appropriate when Section 10(a) is inapplicable and the evidence is insufficient to apply Section 10(b). **See generally Turney v. Bethlehem Steel Corporation**, 17 BRBS 232, 237 (1985); **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Holmes v. Tampa Ship Repair and Dry Dock Co.**, 8 BRBS 455 (1978); **McDonough v. General Dynamics Corp.**, 8 BRBS 303 (1978). The primary concern when applying Section 10(c) is to determine a sum which "shall reasonably represent the . . . earning capacity of the injured employee." The Federal Courts and the Benefits Review Board have consistently held that Section 10(c) is the proper provision for calculating average weekly wage when the employee received an increase in salary shortly before his injury. **Hastings v. Earth Satellite Corp.**, 628 F.2d 85 (D.C. Cir. 1980), **cert. denied**, 449 U.S. 905 (1980); **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981). Section 10(c) is the appropriate provision where claimant was unable to work in the year prior to the compensable injury due to a non-work-related injury. **Klubnikin v. Crescent Wharf and Warehouse Company**, 16 BRBS 182 (1984). When a claimant rejects work opportunities and for this reason does not realize earnings as high as his earning capacity, the claimant's actual earnings should be used as his average annual earnings. **Cioffi v. Bethlehem Steel Corp.**, 15 BRBS 201 (1982); **Conatser v. Pittsburgh Testing Laboratory**, 9 BRBS 541 (1978). The 52 week divisor of Section 10(d) must be used where earnings' records for a full year are available. **Roundtree**, **supra**, 13 BRBS 862 (1981); **compare Brown v. General Dynamics Corporation**, 7 BRBS 561 (1978). **See also McCullough v. Marathon LeTourneau Company**, 22 BRBS 359, 367 (1989).

On the basis of the totality of the record, I find and conclude that Claimant’s average weekly wage was $325.00, pursuant to Section 10(c) of the Act. (CX 19 at 22)

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injury on December 3, 1996 and requested appropriate medical care and treatment. However, the Employer did not accept the claim and did not authorize such medical care. Thus, any failure by Claimant to file timely the physician's report is excused for good cause as a futile act and in the interests of justice as the Employer refused to accept the claim.

Accordingly, the Employer is responsible for such reasonable, necessary and appropriate medical expenses, relating to Claimant's December 3, 1996 accident, subject to the provisions of Section 7 of the Act. Claimant's medical records are in evidence as CX 3. Claimant is also entitled to an award of future medical benefits, also related to the injury before me, and again subject to the provisions of Section 7.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced

by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Section 14(e)

Failure to begin compensation payments or to file a notice of controversion within twenty-eight (28) days of knowledge of the injury or the date the employer should have been aware of a potential controversy or dispute renders the employer liable for an assessment equal to ten (10) percent of the overdue compensation. The first installment of compensation to which the Section 14(e) assessment may attach is that installment which becomes due on the fourteenth day after the employer gained knowledge of the injury or the potential dispute. **Universal Terminal and Stevedoring Corp. v. Parker**, 587 F.2d 608 (3d Cir. 1978); **Fairley v. Ingalls Shipbuilding**, 22 BRBS 184 (1989), **aff'd in pert. part** and **rev'd on other grounds sub nom. Ingalls Shipbuilding v. Director**, 898 F.2d 1088 (5th Cir. 1990), **rehearing en banc denied**, 904 F.2d 705 (June 1, 1990) **Krotsis v. General Dynamics Corp.**, 22 BRBS 128 (1989), **aff'd sub nom. Director, OWCP v. General Dynamics Corp.**, 900 F.2d 506, 23 BRBS 40, 51 (2d Cir. 1990); **Rucker v. Lawrence Mangum & Sons, Inc.**, 18 BRBS 76 (1987); **White v. Rock Creek Ginger Ale Co.**, 17 BRBS 75, 78 (1985); **Frisco v. Perini Corp.**, 14 BRBS 798 (1981). Liability for this additional compensation ceases on the date a notice of controversion is filed or on the date of the informal conference, whichever is earlier. **National Steel & Shipbuilding Co. v. U.S. Department of Labor**, 606 F.2d 875 (9th Cir. 1979); **National Steel & Shipbuilding Co. v. Bonner**, 600 F.2d 1288 (9th Cir. 1978); **Spencer v. Baker Agricultural Company**, 16 BRBS 205 (1984); **Reynolds v. Marine Stevedoring Corporation**, 11 BRBS 801 (1980). Furthermore, the Benefits Review Board has held that an employer's liability under Section 14(e) is not excused because the employer believed that the claim came under a state compensation act. **Jones v. Newport News Shipbuilding and Dry Dock Co.**, 5 BRBS 323 (1977), **aff'd sub nom. Newport News Shipbuilding & Dry Dock Co. v. Graham**, 573 F.2d 167 (4th Cir. 1978), **cert. denied**, 439 U.S. 979 (1978). Furthermore, It is well-settled that the Section 14(e) additional assessment is mandatory and may not be waived by Claimant. **Tezeno v.**

Consolidated Aluminum, 13 BRBS 778 (1981); **McNeil v. Prolerized New England Co.**, 11 BRBS 576 (1979); **Harris v. Marine Terminals Corp.**, 8 BRBS 712 (1978); **Nulty v. Halter Marine Fabricators, Inc.**, 1 BRBS 437 (1975). It is also well-settled that compensation becomes due fourteen (14) days after the employer has knowledge of its employee's injury or death, and not until such time as the claim is filed. **Pilkington v. Sun Shipbuilding & Dry Dock Company**, 9 BRBS 473 (1978). The Employer has consistently failed to participate herein. Thus, Section 14(e) applies on those installments due between December 3, 1996 and November 25, 1998, the date that the informal conference was scheduled. (TR at 8)

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer. Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to the Employer's counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after November 25, 1998, the date that the informal conference was scheduled. Services performed prior to that date should be submitted to the District Director for his consideration.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. The Employer, East River Terminals, Inc., shall pay to the Claimant compensation for his temporary total disability from December 3, 1996 through December 3, 1997, based upon an average weekly wage of $325, such compensation to be computed in accordance with Section 8(b) of the Act.

2. Commencing on December 3, 1996 and continuing through October 31, 1999 the Employer shall pay to the Claimant compensation benefits for his permanent total disability, plus the applicable annual adjustments provided in Section 10 of the Act, based upon his average weekly wage of $325.00, such compensation to be computed in accordance with Section 8(a) of the Act.

3. Commencing on November 1, 1999, the Employer shall pay to Claimant compensation for his permanent partial disability, based upon the difference between his average weekly wage at the time of the injury, $325.00, and his wage-earning capacity after the injury, $166.25, as provided by Sections 8(c)(21) and 8(h) of the Act.

4. The Employer shall furnish such reasonable, appropriate and necessary medical care and treatment as the Claimant's work-related injury referenced herein may require, subject to the provisions of Section 7 of the Act.

5. The Employer shall pay to Claimant additional compensation at the rate of ten (10) percent, pursuant to Section 14(e) of the Act, based upon installments due between December 3, 1996 and November 25, 1998, pursuant to Section 14(e) of the Act.

6. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to Employer's counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the scheduled date for the informal conference, November 25, 1998.

7. If this compensation **ORDER** cannot be effectuated due to the bankruptcy or insolvency of the Employer, Claimant should seek enforcement thereof in U.S. District Court and/or petition the Director, Office of Worker's Compensation Programs, pursuant to Section 18 of the Act, to assume such obligations as are mandated herein.

_____
DAVID W. DI NARDI
Administrative Law Judge

Dated: November 8, 2000
Boston, Massachusetts
DWD:gh:dr